

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 04.10.2019
Pronounced on: 04.11.2019

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.920 of 2001

1. Arumugam
2. Pachaiyammal ... Appellants

Vs.

1.Palani (Deceased)
2. Malarvizhi
3. Gandhimathi
4. Ezhilarasu
5.Malathi ... Respondents

[RR2 to 5 brought on record as LRs of the deceased sole respondent vide order of Court dated 11.01.2019 made in S.A.No.920 of 2001.]

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 26.02.2001 and made in A.S.No.50 of 1998 on the file of the Principal District Court, Tiruvannamalai, reversing the Judgment and decree dated 23.01.1998 and made in O.S.No.128 of 1987 on the file of Sub Court, Tiruvannamalai.

For Appellants : M/s.P.Veena Suresh
for Mr.T.R.Rajaraman

For Respondents 2 to 5 : Mr.S.Parthasarathy
Senior Advocate
for Mr.P.Dinesh kumar

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J U D G M E N T

This second appeal has been filed by the plaintiffs against the Judgment and decree passed by the Principal District Judge, Tiruvannamalai in A.S.No.50 of 1998 dated 26.02.2001, reversing the Judgment and decree passed by the Sub-Judge, Tiruvannamalai in O.S.No.128 of 1987 dated 23.01.1998.

2. The appellants herein had filed a suit in O.S.No.128 of 1987, on the file of the Sub-Judge, Tiruvannamalai to divide the suit properties into 9 equal shares and allot 5 such shares to them. The learned Sub-Judge,

by the Judgment dated 25.02.1994 passed a preliminary decree as prayed for to divide the suit properties into 9 equal shares and allot 5 such shares to the plaintiffs. However, she directed the parties to bear their respective costs.

3. Aggrieved by the same, the defendant had filed an appeal in A.S.No.41 of 1994 on the file of the Additional District Judge-cum-Chief Judicial Magistrate, Tiruvannamalai. During pendency of the said appeal, Exs.A4, B6 and B8 were sent to the Tamil Nadu Finger Print Bureau to compare the admitted Left Thumb Impression of Natesa Gounder found in Ex.A6 with that of the disputed Left Thumb Impressions found in Exs.B6 and B8 and give opinion. Accordingly, the finger print expert gave his opinion. Thereafter, the learned Additional District Judge, Tiruvannamalai, by the Judgment dated 12.01.1996 had allowed the said appeal and set aside the Judgment and decree passed by the trial Court and remitted the matter to the trial Court with a direction to give an opportunity to both the parties for adducing additional evidence with regard to finger print expert's opinion and dispose of the case in accordance with law.

4. In pursuance of the said order, the trial Court had restored the suit on file and summoned the Finger Print expert and examined as C.W.1 and marked his report as Ex.C1. Thereafter, by the Judgment dated 23.01.1998 had again passed a preliminary decree and directed to divide the suit property into 9 equal shares and allot 4 such shares to the 1st plaintiff and one such share to the 2nd plaintiff. However, he directed the parties to bear their respective costs. Aggrieved by the same, the defendant had filed an appeal in A.S.No.50 of 1998 on the file of the Principal District Judge, Tiruvannamalai. The learned Principal District Judge, Tiruvannamalai, by the Judgment dated 26.02.2001 had allowed the said appeal with costs and set aside the Judgment and decree passed by the trial Court dated 23.01.1998 and dismissed the suit with costs. Feeling aggrieved, the plaintiffs have filed the present second appeal.

5. For the sake of convenience, the parties are referred to as described before the trial Court.

6. The averments made in the plaint are in brief as follows:-

(a) The defendant, the 1st plaintiff and the 2nd plaintiff are the sons and daughter respectively of one Natesa Gounder. The said Natesa Gounder and his sons (defendant and the 1st plaintiff) have been constituting an undivided Hindu joint family. Joint family owning, possessing and enjoying several items of ancestral properties, including the suit properties. The said Natesa Gounder and his brothers Ayyakannu Gounder and Duraisamy Gounder inherited vast extent of ancestral properties from their father Singara Gounder, who

died long ago. The said Natesa Gounder and his brothers orally divided their ancestral joint family properties into three equal shares and each one of them took one share, in the partition which took place in the year 1940. In the said partition, each one of the aforesaid three brothers got about 8 acres of land plus well and $\frac{1}{3}^{\text{rd}}$ of share in the house. The said ancestral lands were yielding lot of income. After meeting all the requirements of the members of the said joint family, a sizeable surplus income had been always left behind in the hands of the said Natesa Gounder. The said Natesa Gounder, who was the Manager and Kartha of the Joint family consisting of himself and his sons, by utilizing the surplus income derived from the ancestral lands, the said Natesa Gounder purchased several items of lands and also the share in the house from his divided brother Duraisamy Gounder. Thus, the suit properties were purchased by the said Natesa Gounder in his capacity as manager of the joint family, by utilizing the surplus income derived from the ancestral joint family properties, from one Santha Gounder for a sum of Rs.1500/- under the registered sale deed dated 09.02.1950. Similarly by utilizing the surplus income derived from the ancestral joint family properties, the said Natesa Gounder purchased the northern half of the schedule mentioned house (which was then a thatched house) from his divided brother Duraisamy Gounder in the year 1942. The southern half of the schedule mentioned house is the ancestral house which the said Natesa Gounder got in the oral partition. From and out of the surplus income, the said Natesa Gounder had constructed the tiled house on the western portion of the vacant site, wherein he and his sons have been living. Except agriculture, the said Natesa Gounder had no other source of income. The properties which were acquired by Natesa Gounder were impressed with the character of ancestral joint family properties in the hands of Natesa Gounder and his sons, all of whom have been always enjoying and treating all the said properties as their ancestral joint family properties.

(b) The plaintiffs' mother Rajambal had purchased 87 cents in Survey No.6/1B situated at Nochimalai Village, Tiruvannamalai Taluk, from and out of her own funds. She died intestate about six years ago leaving behind her husband Natesa Gounder, sons (first plaintiff and the defendant) and daughter (second plaintiff) as her legal heirs. After demise of Rajambal, her legal heirs have been jointly enjoying the said land which they succeeded from her. The first plaintiff is issueless and further he is a gullible person who is not worldly wise and taking advantage of the same, the defendant and his father Natesa Gounder attempted to sell several items of ancestral joint family properties secretly, with a view to defeat and defraud the first plaintiff. Hence, the first plaintiff issued a lawyer's notice dated 26.02.1985 to his brother (defendant), and father Natesa Gounder and the intending purchasers. Though the defendant and his father Natesa Gounder received the said notice, they did not send any

reply. After receipt of the said notice, the defendant and their father Natesa Gounder suggested to the first plaintiff that all of them (including the first plaintiff) could sell some of the ancestral joint family lands and also the land bearing Survey No.6/1B inherited by Rajambal, in favour of one Boomadevi. Accordingly, all of them jointly executed the sale deed in favour of Boomadevi on 16.03.1985 for a sum of Rs.30,000/- and received their proportionate share from Boomadevi.

(c) After alienating the aforesaid properties, the first plaintiff, the defendant and their father Natesa Gounder have been enjoying the remaining ancestral joint family properties, which are mentioned in the plaint schedule in which the first plaintiff is entitled to 1/3rd share in his own right by birth, the defendant and their father Natesa Gounder are entitled to 1/3rd share each. The said Natesa Gounder died intestate on 27.01.1987, at about 1.00 p.m., leaving behind his undivided 1/3rd share in the schedule mentioned properties in which the plaintiff and the defendant are entitled to 1/3rd share each. So, totally the first plaintiff is entitled to 4/9th share and second plaintiff is entitled to 1/9th share and defendant is entitled to 4/9th share. Hence, the plaintiffs have been orally calling upon the defendant to divide for amicable partition of the suit properties but the defendant claims that Natesa Gounder settled the entire suit house in favour of the defendant about 11 years ago. The said Natesa Gounder did not execute any such settlement in favour of the defendant. If any such document is in existence, it must be a forged and fabricated one. Further, the defendant has been falsely claiming that Natesa Gounder executed a Will in respect of the suit land in his favour. Thereupon, the first plaintiff had verified in the Sub-Registrar Office, Tiruvannamalai, to find out whether any Will, purported to have been executed by his father has been registered. On enquiry, the first plaintiff came to know that the defendant had spuriously brought about the so called Will dated 27.01.1987. The so called Will is nothing but a forged and fabricated Will, spuriously brought about by the defendant by committing the offence of not only forgery but also impersonation. The said Natesa Gounder did not execute any such Will and in fact, he had no sound and disposing state of mind and he had no mental capacity to execute the impugned Will on 27.01.1987. The said Natesa Gounder had been seriously ailing from fever and tuberculosis and during the last two months of his life, he was completely unconscious, bed-ridden and he was in coma till his death which occurred at about 1.00 p.m., on 27.01.1987. Therefore, the said Natesa Gounder could not have executed the said Will.

(d) A perusal of the said Will shows that it was registered between 11 to 12 a.m., on 27.01.1987. The very fact that Natesa Gounder died at about 1.00 p.m., on 27.01.1987 will clearly go to show that he did not execute the Will. All

the recitals incorporated in the so called Will are false. The recitals that the first plaintiff released his right and interest in the family properties is false. The first plaintiff never relinquished his right, title and interest in any of the joint family properties including the suit properties. The said release deed must be a forged and fabricated one. Since the alleged Will is a forged one, the defendant has not derived any right under the said document. Hence, the plaintiffs were constrained to file the above suit for partition.

7. The averments made in the written statement are in brief as follows.

(a) It is false to state that the Natesa Gounder and his brothers inherited vast extent of ancestral properties from their father Singara Gounder. It is also false to state that in the partition, the said Natesa Gounder and his brothers got about 8 acres of land each. In fact, in or about 1940, Natesa Gounder and his brothers partitioned a meagre extent of land and a thatched house. The landed properties which fell to the share of Natesa Gounder was so meagre that it did not yield sufficient income to meet both ends. Out of sheer necessity, Natesa Gounder sold a little extent of land which fell to his share and appropriated the sale proceeds to his family expenses. The ancestral joint family lands were not left in the hands of Natesa Gounder for the purchase of other properties. It is utter false to state that the joint family properties yielded sizable surplus income and by utilizing the surplus income, he had purchased several items of lands and also the share of his brothers Duraisamy Gounder in the house. On the other hand, the said Natesa Gounder was having a double bullock cart and by plying the said Cart, he was earning money and saving the surplus income. Out of his own earnings, the said Natesa Gounder purchased landed properties and also the share of his brother Duraisamy Gounder in the house. Therefore, they are all his self-acquired properties and not the joint family properties as alleged in the plaint.

(b) It is true that Natesa Gounder constructed a tiled house in 1949 but the same was constructed out of his own earnings. It is false to state that except agriculture, Natesa Gounder had no other source of income. It is also false to state that properties acquired by Natesa Gounder were impressed with the character of ancestral joint family properties and that Natesa Gounder and his sons have been enjoying and treating all the said properties as the ancestral joint family properties. Out of his own funds, the said Natesa Gounder had purchased an extent of 87 cents in Survey No.6/1B in the name of his wife Rajambal. It is true that Rajambal died in the year 1982. But it is false to state that after her death, the plaintiffs, defendant and their father succeeded to the said property. It is false to state that the first plaintiff is gullible and not worldly wise. It is also

false to allege that the defendant and their father attempted to sell several items of ancestral joint family properties secretly with a view to defeat the first plaintiff's right. When the father Natesa Gounder wanted to sell certain properties to Bonda (a) Pachaiyappan and Subramani, the first plaintiff herein raised certain objections by issuing a notice. The purchasers were perturbed by the same and they offered to pay some meagre amount to the first plaintiff and asked the plaintiffs to sign in the document. Accordingly, they signed in the said document.

(c) The said Natesa Gounder when he was in a sound disposing state of mind executed a registered Will dated 27.01.1987 in favour of the defendant and his issues. Till the last minute, the said Natesa Gounder was conscious of what he was doing and what was going around him. He died at 5.p.m., on 27.01.1987 and that the Will was registered between 11 and 12 on the same day. Therefore the allegations that the said Natesa Gounder was in coma stage during his last stage and he died at 1.00 p.m., on 27.01.1987 are all false.

(d) On 24.04.1976, the first plaintiff executed a release deed in favour of the defendant and his father releasing his share for a consideration of Rs.500/-. The said Natesa Gounder settled third item of the suit properties in favour of the defendant under the Registered settlement deed on 24.04.1976. Therefore, the defendant became absolute owner of the item No.3 of the suit properties. It is false to state that the settlement deed and the Will were forged and fabricated by the defendant. Even if the properties are considered to be joint family properties, since the first plaintiff released his share under the Registered release dated 24.04.1976 in favour of the defendant and his father, he cannot have any right over the suit properties. Therefore, the defendant prayed to dismiss the suit.

8. Based on the aforesaid pleadings, the learned Sub-Judge, Tiruvannamalai had framed necessary issues and tried the suit. During trial, on the side of plaintiffs, the plaintiffs 1 and 2 examined themselves as P.Ws.1 and 2. They also examined two more witnesses as P.Ws.3 and 4. They marked Exs.A1 to A12 as exhibits. On the side of the defendant, the defendant examined himself as D.W.1. He also examined four more witnesses as D.Ws.2 to 5. He marked Exs.B1 to B40 as Exhibits.

9. The learned Sub-Judge, Tiruvannamalai, after considering the materials placed before her, found that the father of both the parties namely Natesa Gounder got certain ancestral properties in partition which took place orally between him and his brothers. She also found that the properties were agricultural lands and that they were yielding income. She further found that the defendant failed to prove that the said Natesa Gounder was plying double bullock cart and earned money. Accordingly, she held that the suit

properties were purchased from and out of the income derived from the ancestral properties and hence the suit properties also should be treated as joint family properties. She further found that the defendant failed to prove that Exs.B7 and B8 are genuine documents. She further found that even though it is stated that the first plaintiff had executed the registered release deed in favour of the defendant and their father Natesa Gounder under Ex.B7 dated 24.04.1976, subsequently all the family members had jointly executed Ex.A5 sale deed dated 16.03.1985 in favour of one Boomadevi and hence Ex.B7 release deed was not acted upon. She further found that Ex.B6 Will also not properly proved and accordingly, she held that the plaintiffs are entitled to 5/9th share in the suit properties and passed a preliminary decree directing to divide the suit properties into 9 equal shares and allot 5 such shares to the plaintiffs.

10. Aggrieved by the said, Judgment and decree, the defendant had filed an appeal in A.S.No.41 of 1994 on the file of the Additional District Judge-Cum-Chief Judicial Magistrate, Tiruvannamalai. During pendency of the said appeal, to compare the admitted thumb impression of Natesa Gounder found in Ex.A4 with that of the left thumb impressions found with Exs.B6 and B8, the aforesaid documents were sent to the Tamil Nadu Finger Print Bureau and report was received. Hence, the learned Additional District Judge, Tiruvannamalai, by the Judgment and decree dated 12.01.1996 allowed the said appeal and set aside the judgment and decree passed by the Trial Court and remitted the matter back to the trial Court with a direction to give an opportunity to both parties to examine the finger print expert and mark his report and dispose of the case in accordance with law. In pursuance of the said order of the first appellate Court, the trial court had restored the suit on file and summoned the finger print expert and examined as C.W.1 and his report has been marked as Ex.C.1.

11. After considering the materials placed before him found that since description of property not given in Ex.B7 and value also not given, Ex.B7 is not a valid document. He further found that since Ex.B7 is not a valid document, the first plaintiff is also one of the coparceners without his consent, the said Natesa Gounder could not execute a valid settlement deed and as such Ex.B8 settlement deed also not valid. He further found that Ex.B6 Will was said to have been executed by Natesa Gounder on 27.01.1982 and on the very same day, he died and hence he could not have executed the said Will in a disposing state of mind. Accordingly, he passed a preliminary decree directing to divide the suit properties into 9 equal shares and allot 4 such shares to the first plaintiff and one such share to the second plaintiff. Aggrieved by the same, the defendant had filed an appeal in A.S.No.50 of 1998 on the file of the Principal District Judge, Tiruvannamalai. The learned Principal District Judge,

Tiruvannamalai by his Judgment dated 26.02.2001 had allowed the said appeal and set aside the Judgment and decree passed by the Trial Court and dismissed the suit. Aggrieved by the same, the plaintiffs have filed the present second appeal.

12. This Court at time of admitting the second appeal has formulated the substantial questions of law:-

''(i) Whether the lower appellate court is right in relying upon the document Ex.B8 and holding against the plaintiffs applying the Doctrine of Estoppel as a pure question of law in the absence of pleadings or sufficient materials on record to invoke Section 115 of the Indian Evidence Act?

(ii) Whether the second plaintiff's claim for 1/9 share in the suit property can be negated on the ground that the suit had been filed prior to the amendment of the Hindu Succession Act in 1989 ? and

(iii) Whether the father-Natesa Gounder is competent to execute the settlement deed and Will under Ex.B-8 and Ex.B-6 in respect of the Joint Family Properties?''

13 M/s.P.Veena Suresh for Mr.T.R.Rajaraman, the learned counsel appearing for the appellants and Mr.S.Parathasarathy learned senior counsel for Mr.P.Dinesh kumar, the learned counsel appearing for the respondents.

14. Substantial questions of law (i) to (iii):-

The learned counsel appearing for the appellants has submitted that the first appellate Court erred in reversing the well considered Judgment of the trial Court. She further submitted that when the execution of Ex.B7 release deed is specifically denied by the 1st plaintiff and the trial Court also gave findings against the defendant, the learned first appellate Court Judge, erred in assuming as if the 1st plaintiff had admitted the execution of release deed in his evidence. She further submitted that the first appellate Court failed to appreciate that in Ex.B7 description of property has not been given. She further submitted that the first appellate Court erred in holding that the 1st plaintiff had admitted in his evidence that he had attested in Ex.B8 settlement deed. She further submitted that the first appellate Court failed to consider that the defendant has not proved the signature made in Ex.B8 is that of the first plaintiff. She further submitted that the 1st appellate Court failed to see that the deceased Natesa Gounder was 85 years old and he was suffering from ailments and as such, he could not have executed Ex..B6 Will in a sound disposing state of mind. She further submitted that the first appellate Court failed to consider that the said Natesa Gounder died on the same date of the alleged execution of Ex.B6 Will. She further submitted that the very fact that the said Natesa Gounder died on the same date of

execution of Ex.B6 will would show that he could not be in a sound disposing state of mind.

15. The learned counsel for the appellants has further submitted that the first appellate Court failed to consider that if really the first plaintiff executed Ex.B7 release deed, there was no necessity to join first plaintiff as one of the vendors in Ex.A5 sale deed. She further submitted that the first appellate Court failed to consider that if really the properties are self acquired properties of Natesa Gounder, there was no necessity to get Ex.B7 release deed. She further submitted that the first appellate Court failed to consider that even after execution of the alleged release deed, the first plaintiff continued to be in possession of a portion of item-3 of the suit properties. She further submitted that the first appellate Court failed to consider that the second plaintiff has claimed right in the share of her father Natesa Gounder as legal heir and not as co-parcener. She further submitted that there is no pleading in the written statement that the first plaintiff had signed in Ex.B8 settlement deed as one of the attestors and hence he is estopped from denying the genuineness of Ex.B8 settlement deed. She further submitted that since there is no pleading with regard to estoppel, the first appellate Court ought not to have come to the conclusion that the first plaintiff estopped from denying genuineness of Ex.B8 settlement deed. She further submitted that the first appellate Court failed to see that the Will cannot be accepted merely by proving the left thump impression of testator. She further submitted that since the testator died on the same date of the alleged execution of Will, the propounder of the said Will should establish that the testator affixed his left thump impression in a sound disposing state of mind, but in this case, the defendant failed to discharge the aforesaid burden and therefore she prayed to allow the second appeal and set aside the Judgment and decree passed by the first appellate Court and restore the Judgment and decree passed by the trial Court.

16. Per contra, the learned senior counsel for the respondent/defendant has submitted that there is no evidence that Natesa Gounder got sufficient ancestral property and the said property yielded sufficient income and from out of the said income, he purchased the other properties including the suit properties. He further submitted that oral evidence adduced on the side of the defendant would clearly show that there was no income from the ancestral property and the said Natesa Gounder was earning by plying a double bullock cart and from the said earnings, he purchased the properties. He further submitted that the first plaintiff while examining himself as P.W.1 had categorically admitted in the cross-examination that only at the request of the purchasers, the plaintiffs signed in Ex.A5 sale deed and the entire sale consideration has been received by their father Natesa Gounder only. He further submitted that under Ex.A5 sale deed property

belonged to their mother Rajambal was also sold and hence the plaintiffs also added as parties in the said document and that does not mean that the plaintiffs have any right over the suit properties. He further submitted that that plaintiffs had not pleaded that at the time of executing Ex.B7 release deed their father Natesa Gounder had animosity with the first plaintiff and that being so, there was no necessity for creating Ex.B7 release deed in the year 1976 itself. He further submitted that on 24.04.1976 in the morning, the first plaintiff had executed Ex.B7 release deed and on the same day in the evening, the said Natesa Gounder had executed Ex.B8 in faovur of the defendant in which the first plaintiff also signed as one of the attestors. He further submitted that in pursuance of the said document, the defendant has become an absolute owner of the item No.3 of the suit properties (House property) and house tax has been assessed in the name of the defendant and the defendant got electricity service connection also in his name and for that, there was no objection from the first plaintiff.

17. The learned Senior counsel for the respondent has further submitted that even though the first plaintiff claimed in his evidence that he was present at the time of death of his father Natesa Gounder and no will was executed, the evidence of the finger print expert (C.W.1) would clearly show that the thump impression found in Ex.B6 and B8 are that of Natesa Gounder. He further submitted that Ex.B6 Will is a registered one and the same was registered on the date of execution itself. He further submitted that unless testator Natesa Gounder appeared before the Sub-Registrar and admitted the execution of the Will, Sub-Registrar would not have registered the same. The aforesaid facts would falsify the contention of the first plaintiff that the testator Natesa Gounder not at all went to the Sub-Registrar's Office and executed Ex.B6 Will. He further submitted that Ex.B6 Will would show that it was presented before the Sub-Registrar on 27.01.1987, between 11 and 12 hours for registration and Ex.B5 would show that the said Natesa Gounder died only at 4.p.m., and therefore, the genuineness of the Will and disposing state of mind of the testator could not be doubted. He further submitted that even assuming that the suit properties are joint family properties, since the first plaintiff executed Ex.B7 release deed, he lost the right if any, in the suit properties and as such he cannot claim any right in the suit properties. He further submitted that the defendant has proved Exs.B6, B7 and B8 by examining attestors and also finger print expert. He further submitted that the trial Court failed to consider the aforesaid facts in a proper perspective and decreed the suit as prayed for, but the first appellate Court had rightly interfered with the findings of the trial Court and set aside the Judgment and decree passed by the trial Court and dismissed the suit and in the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the second appeal.

18. The learned Senior counsel for the respondent in support of his contentions relied upon the following decisions:

1. Thamma Venkata Subbamma (died) by LR Vs. Thamma Rattamma and Others (1987 (3) SCC 294 ;

2. Smt.Lata Bhol and Another Vs Durga Prasad Bhol, AIR 2003 Orissa 202;

3. Janaki Devi Vs. R.Vasanthi & Others 2005 -1-L.W-455.

19. It is an admitted fact that the first plaintiff and the defendants are the sons and the second defendant is the daughter of one Natesa Gounder. It also an admitted fact that the said Natesa Gounder died on 27.01.1987. It is also an admitted fact that his wife Rajambal pre-deceased him. It is also an admitted fact that the said Natesa Gounder had purchased several properties.

20. According to the plaintiffs, the said Natesa Gounder's father Singara Gounder got ancestral properties and after his death, the said Natesa Gounder, his brothers Ayyakannu Gounder and Duraisamy Gounder inherited the said ancestral properties and they orally divided the ancestral joint family properties into three shares and in the said oral partition, the said Natesa Gounder got certain agricultural lands and from the income derived from the said ancestral agricultural lands, the said Natesa Gounder had purchased the properties including the suit properties. But, the case of the defendant is that the said Natesa Gounder got only a small extent of lands and from that land, no income derived and hence, the said Natesa Gounder was plying a double bullock cart and earned money and out of the said earnings, he purchased the properties including the suit properties.

21. Both the parties have not furnished the details of the ancestral properties which were inherited by Natesa Gounder. Since the defendant has admitted that their father Natesa Gounder got certain ancestral properties, the burden is upon him to prove that no income was derived from the said properties and that the said Natesa Gounder earned money by plying a double bullock cart. D.W.1 himself has admitted in his cross-examination that their father got ancestral agricultural land which had irrigation facilities. So, it is clear that the said Natesa Gounder inherited some Nanja agricultural lands. Further to substantiate the plea that the said Natesa Gounder was plying a double bullock cart and earned money, he has not produced any materials. In Ex.B6 Will alone, it is stated that the said Natesa Gounder had purchased the properties by plying a Cart but in other documents, viz., Ex.A1 (Original sale deed) dated 09.02.1950, Ex.B2 (Sale deed) 29.05.1942), Ex.B7 (Release deed dated 24.04.1976) and Ex.B8 (settlement deed dated 24.04.1976) Natesa Gounder has been described as agriculturist. Therefore, the contention of the

defendant that the said Natesa Gounder was plying a double bullock cart and earned money and only from the said earnings, he purchased the suit properties, cannot be accepted.

22. It is also to be pointed out that if really the said Natesa Gounder had purchased the properties out of his own earnings, there was no necessity to get Ex.B7 release deed from the first plaintiff. The aforesaid act also would show that the joint family got ancestral properties.

23. The next question which has to be decided is that whether the first plaintiff had executed Ex.B7 release deed in favour of his father Natesa Gounder and his brother (defendant). According to the first plaintiff, he has not executed the said Ex.B7 release deed. But, the case of the defendant is that the first plaintiff had executed Ex.B7 release deed by receiving Rs.500/- on 24.04.1976 and on the same day, their father Natesa Gounder had executed Ex.B8 settlement deed in favour of the defendant and in the said settlement deed, the first plaintiff signed as one of the witnesses. Though the first plaintiff in his plaint had disputed the execution of Ex.B8 settlement, by Natesa Gounder in favour of the defendant, in the Pre-suit notice dated 26.02.1985 (Ex.A2), he had categorically admitted that his father Natesa Gounder had executed a settlement deed on 24.04.1976 in favour of the defendant. Further, the evidence of finger print expert (CW.1) also would show that the said Natesa Gounder had executed Ex.B8 settlement deed. Therefore, it is not open to the first plaintiff to take a plea that Ex.B8 settlement deed was not executed by his father Natesa Gounder.

24. As already pointed out that in Ex.A2 notice, the first plaintiff has admitted that his father Natesa Gounder had executed a settlement deed dated 24.04.1976 in favour of the defendant but he has not stated as to when and under what circumstances, he came to know about the aforesaid settlement deed dated 24.04.1976. So it has to be presumed that he got knowledge about the said settlement from the date of execution of the said document. As already pointed out that the case of the defendant is that in the said settlement deed, the first plaintiff also signed as one of the attestors.

25. A perusal of Ex.B8 also shows that the first plaintiff had signed as one of the witnesses. Dws. 2 and 3 are witnesses to Ex.B7 and B8 documents. The evidence of DWs. 2 and 3 also would show that the first plaintiff had signed as one of the witnesses in Ex.B8. So, that must be the reason for not stating in Ex.A2, when he came to know about the Ex.B8 settlement deed. Once it is proved that the first plaintiff got knowledge about Ex.B8 settlement deed on the date of execution of the said document itself because he signed as one of the witnesses in the said document, it has to be presumed that Ex.B7 also might have executed by the first plaintiff on

the same day i.e., on 24.04.1976.

26. As already pointed out that the first plaintiff got knowledge about Ex.B7 and B8 on the date of execution of the said documents but he has not taken any steps to set aside those documents. Further, the first plaintiff has not stated either in the plaintiff or in his evidence that at that time of execution of Ex.B7 and B8, his father Natesa Gounder and the defendant had any animosity with him. Therefore, there is no reason to suspect the genuineness of Ex.B7.

27. The learned counsel for the appellants/plaintiffs contended that description of the properties not mentioned in Ex.B7 release deed and further no reason has been stated in the said document for executing the same. In Ex.B7, it is stated that the defendant is not ready to discharge the family debts and hence he wanted to go away by executing release deed after receiving a sum of Rs.500/- Further, it is stated that he has relinquished of his right in respect of the family properties. Under the said circumstances, merely because description of properties not given in Ex.B7, it cannot be said that the said document is not valid. Further, reason also stated in the said document as the defendant is not willing to discharge the family debts.

28. Further, the evidence of DWs.2 and 3 would clearly show that the first plaintiff had executed Ex.B7 release deed after receiving a sum of Rs.500/-. Further, the said document is a registered one and hence it will have sanctity. Moreover, as already pointed out that on the same date, Ex.B8 was executed in which the first plaintiff signed as one of the attestors. If really he had not executed Ex.B7 release deed, he could not have allowed his father to execute Ex.B8 settlement deed in favour of the defendant and also he would not have signed as one of the witnesses.

29. The learned counsel for the appellants /plaintiffs also contended that if really the first plaintiff had executed Ex.B7 release deed, on 24.04.1976 , the defendant and the said Natesa Gounder could not have permitted the plaintiffs to join in Ex.A5 sale deed dated 16.03.1985. It is to be pointed out that in Ex.A5 sale deed, 5 items of the properties were sold and out of 5 items, the item No.1 stood in the name of mother of the plaintiffs and the defendant namely Rajambal. Admittedly Ex.B7 release deed was obtained only in respect of joint family properties and not in respect of the property of Rajambal. When the property of Rajambal was sold, naturally the purchasers would insist all the legal heirs should sign. Further, the first plaintiff while examining himself as PW.1, in his cross-examination has categorically admitted that since the purchaser insisted, he also signed and also admitted that the entire sale consideration has been received by his father only. Therefore merely because, the plaintiffs also signed in Ex.A5 sale deed, it cannot be said that the first plaintiff

would not have executed Ex.B7 released deed.

30. Once it is proved that the first plaintiff had executed Ex.B7 release deed in favour of the defendant and their father Natesa Gounder and thereafter, only two coparceners in the family viz., Natesa Gounder and the defendant. In such a case, the said Natesa Gounder can execute a settlement deed in favour of the defendant. Since already the first plaintiff had executed a release deed, he cannot question the execution of Ex.B8 settlement deed by his father Natesa Gounder in favour of the defendant. Therefore, Ex.B8 settlement is a valid one and by virtue of the said settlement deed, the defendant has become an absolute owner of item No. 3 of the suit properties(House property).

31. It is also to be pointed out that in pursuance of Exs.B7 and B8 documents, the defendant got transferred the house tax to his name. Further, he also got Electricity connection and water connection in his name. The aforesaid facts proved through Exs.B9 to B34. The first plaintiff also produced certain house tax receipts and water tax receipts and marked as Exs. A9 to A12 but in those documents, the defendant has been shown as owner of the house. But the first plaintiff has not taken any steps to set aside the house tax and water tax assessments in the name of the defendant. All these facts would show that Exs. B7 and B8 are genuine documents and they were acted upon.

32. In THAMMA VENKATA SUBBAMMA (DEAD) BY LR VS. THAMMA RATTAMMA AND OTHERS (cited supra), the Hon'ble Supreme Court in paragraph 17 has observed as follows:-

"17. It is, however, a settled law that a coparcener can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of all other coparceners. Such a gift would be quite legal and valid."

33. From the aforesaid decision, it is clear that a coparcener can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of all other coparceners. In this case as already pointed out that the first plaintiff had relinquished his rights over the coparcenary property through Ex.B7 release deed. After executing the said Ex.B7 release deed, the remaining coparceners would be only the father Natesa Gounder and the defendant herein. In such a case, the father can execute a valid settlement deed in favour of the remaining coparcener namely the defendant. Accordingly, the settlement deed Ex.B8, which was executed by the father Natesa Gounder in favour of the defendant is legally valid.

34. Insofar as Ex.B6 Will is concerned, the first plaintiff has pleaded in his plaint that he came to know that

the defendant spuriously brought about the so called Will dated 27.01.1987 purported to have been executed by their father Natesa Gounder relating to items 1 and 2 of the suit properties. He further stated that he applied for and got a registration copy of the said Will and a perusal of copy of the said Will would show that the said Will is nothing but forged and fabricated will. He further stated that the said Will was created by impersonation and their father did not execute the said Will. He further stated that their father Natesa Gounder had been seriously ailing from fever and tuberculosis during the last 2 months of his life and he was completely unconscious, bedridden and he was in coma stage till his death. He further stated that the said Natesa Gounder died about 01.00 p.m., on 27.01.1987. He further stated that Will shows that it was registered between 11 to 12 a.m., on 27.01.1987 and hence their father Natesa Gounder could not have executed the said Will.

35. Since the first plaintiff denied the execution of Ex.B6 Will by their father Natesa Gounder, the burden is upon the defendant to prove the execution of the said Will. In order to prove the execution of the said Will, the defendant examined the attestors as D.W.4 and 5. Both the witnesses deposed that the Will was written by one Munusamy Pillai at Sub-Registrar Office, Tiruvannamalai. They further deposed that Natesa Gounder gave instructions for writing the Will. The scribe after writing the Will read over the contents and that after admitting the same, the said Natesa Gounder affixed his left thumb impression in all the pages of the Will and thereafter they had signed as witnesses. They also deposed that they had seen the affixing of thumb impressions by Natesa Gounder and the said Natesa Gounder also had seen when they signed. They also deposed that at the time of executing the said Will, the said Natesa Gounder was in sound disposing state of mind. DW4, further deposed that the said Will was presented before the Sub-Registrar and he identified the said Natesa Gounder before the Sub-Registrar and also signed to that effect. Even though, the aforesaid witnesses were cross-examined by the plaintiffs, nothing was elicited to discredit their evidence. Further, the finger print expert was examined as C.W.1 and his report has been marked as Ex.C1. The evidence of C.W.1 and Ex.C.1 would also clearly show that the left thumb impressions found in Ex.B6 are that of Natesa Gounder. Therefore, the contention of the first plaintiff that Ex.B6 Will was created by impersonation cannot be accepted.

36. Though, the first plaintiff while examining himself as P.W.1 has deposed that the said Natesa Gounder died on 27.01.1987 at about 1.00 p.m., he has admitted in his cross-examination that he only performed the last rites to his father and the obituary card was marked through him as Ex.B1. In Ex.B1, it is stated that the said Natesa Gounder died on 27.01.1987 at about 4.p.m., Since P.W.1 has admitted the said obituary card and the same was marked as exhibit only through

him he cannot deny the contents of Ex.B1.

37. The only suspicious circumstance, pointed out by the first plaintiff is that Ex.B6 Will shows that it was registered between 11 to 12 a.m., on 27.01.1987 and on the same day, the testator Natesa Gounder died at 1.00 p.m., and hence he could not have executed the said Will in a sound disposing state of mind. As already pointed out that Ex.B1 would show that the said Natesa Gounder died only at 4.00 p.m., Therefore, the contention of the first plaintiff that the said Natesa Gounder died at about 1.00 p.m, is not correct. Further the evidence of finger print expert (CW.1) would clearly show that the left thumb impressions found in Ex.B6 are that of Natesa Gounder. Further, Ex.B6 is a registered Will and it should have its solemnity.

38 . In JANAKI DEVI VS V.R.VASANTHI & OTHERS (cited supra) a Division Bench of this Court has held that the certificate issued by the Registrar would certainly, constitute sufficient evidence to prove the document, its execution also to same extent. For proper appreciation the relevant paragraph of the aforesaid decision is extracted hereunder:-

"41. We have already given a finding regarding the genuineness of the execution and its registration on the basis of the unchallenged evidence given by P.W.1 and considering these proved facts supported by the above rulings, it should be further held, in view of Sections 52(1) (a), 58 & 60 of the Registration Act, the certificate issued by the Registrar would certainly, constitute sufficient evidence to prove the document, its execution also to some extent. For the foregoing reasons, we are fully satisfied, that the requirements of conditions in proving a Will, as mentioned supra are well established, and the burden of proof also discharged by the plaintiff, deserving her, to receive the order, for letters of administration."

39. In this case as already pointed out that the finger print expert who has been examined as C.W.1 has categorically deposed that the left thumb impression found in Ex.B6, B8 are tallied with the left thumb impression found in the admitted document of Ex.A4. Further in view of Section 60 of the Registration Act , a registered Will should have solemnity.

40. In Smt. Lata Bhol and another Vs. Durga Prasad Bhol (cited supra), the testator passed away on the next date of the execution of the Will. It was held that merely because of the testator passed away on the subsequent day, cannot be regarded as one of the suspicious circumstances shrouded at the time of execution of the Will. In this case, evidence of D.Ws. 4 and 5 would clearly show that the said Natesa Gounder

had executed Ex.B6 Will in sound disposing state of mind. The plaintiffs have not adduced any contra evidence to show that the said Natesa Gounder was in coma stage during his last days. As already pointed out that the said Natesa Gounder appeared before the Sub-Registrar and presented Will and admitted the execution. It is not the case of the first plaintiff that Sub-Registrar colluded with the defendant and obtained thumb impression from the Natesa Gounder when he was in coma stage or after his death. The trial Court without taking into consideration of the aforesaid facts had held that the defendant failed to prove the execution of Ex.B6 to B8, but the first appellate Court after considering the aforesaid facts in a proper perspective had rightly held that the first plaintiff had executed Ex.B7 release deed and also signed as one of the attestors in Ex.B8 and the defendant had proved the execution of Ex.B8 settlement deed and also Ex.B6 Will by examining D.Ws. 2 to 5 and also through C.W.1. In the said findings, this Court does not find any infirmity. Since the deceased Natesa Gounder did not die intestate and no property is available for partition, the plaintiffs are not entitled to seek partition. Accordingly, the substantial questions of law are answered against the appellants/plaintiffs.

41. In the result, the second appeal is dismissed confirming the Judgment and decree passed by the first appellate Court. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

Msrn

To

1. The Principal District Judge,
Tiruvannamalai
2. The Sub Judge,
Tiruvannamalai
3. The Section Officer,
V.R. Section,
High Court, Madras.

S.A. No.920 of 2001